No. 53246-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

PIERCE COUNTY, et al.,

Resonents,

vs.

JACOB IVAN SCHMITT,

Appellant.

Kitsap County Superior Court Cause No. 17-2-01111-0

The Honorable Judge Melissa Hemstreet

Appellant's Opening Brief

Jacob Ivan Schmitt #711473
Monroe Correctional Complex - TRU
16774 - 170th Dr. SE/P.O. Box 888
Monroe, WA 98272

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I. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Defendant Pierce County Jail (hereinafter "PCJ") took control of appellant Jacob Ivan Schmitt (hereinafter "Schmitt") on December 3, 2013, at 1822 hours, after Schmitt was arrested and charged with robbery first degree, and attempting to elude a police vehicle. **CP 632-633.** Schmitt was in custody and control of PCJ until September 16, 2014. **CP 633.** PCJ took control of Pollard Faalogo (hereinafter "Faalogo") on May 11, 2014, at 1444 hours, after Faalogo was arrested and charged with attempting to disarming a police officer, assault in the third degree, and assault in the second degree. **CP 637-638.** Faalogo was in the custody and control of PCJ until September 4, 2014. **CP 638.**

On June 17, 2014, at approximately 0700 hours, Deputy Wales (hereinafter referred to as "Wales") was working in 3-West of what is commonly referred to as "the old jail." **CP 641.** Wales unlocked cells 1, 2/3, 4/5, 6/7, and 8/9 in 3-West B-Unit. **Id.; CP 644 lines 24-25; CP 646 lines 4-15.**

Wales knew Schmitt to be sleeping when unlocking Schmitt's cell 2/3 on the morning of June 17, 2014.

> "When I/M Faalogo assaulted I/M Schmitt today I/M Schmitt was in a dead sleep before the assault (I know this because I viewed I/M Schmitt sleeping before I left the unit moments before the assault occurred).

CP 642. Wales was correct, Schmitt was in a dead sleep when

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Wales unlocked the door to cell 2/3. CP 650 lines 20-21; CP 625-626 at ¶3. Had Wales woken Schmitt, Schmitt would have relocked the cell door. CP 626 at ¶3 and ¶4.

After unlocking these five cells, Wales left 3-West B-Unit, abandoning the sleeping Schmitt. CP 641. Faalogo then entered Schmitt's unsecured cell and commenced a violent attack upon the helpless, unsuspecting, and sleeping Schmitt. CP 641-642; CP 652 lines 3-8; CP 650 lines 20-25; CP 654 lines 1-3; CP 626 at ¶6.

During the brutal attack by Faalogo, Schmitt managed to struggle to the cell door and press the emergency call button in an attempt to secure help. CP 654 line 12; CP 656 lines 16-24; CP 658 lines 4-12.

Wales "heard a scream come from B Unit: 'AAAAAAAHHHHHHH!!!!!!!!!!!!'" CP 641. Wales then "went back into B unit to check the inmates. Id. Wales "thought the screaming had come from the upper tier," where, after a check, Wales "didn't see any victims[.]" Id. Wales did not check the five cells on the lower tier which he had unlocked while knowing that Schmitt was asleep. CP 641; CP 670 lines 13-14; CP 672 lines 16-25.

When Wales went into B Unit to "check the inmates," the entry door could be heard to "pop open," and B Unit "just went quiet." CP 672 lines 7-10. There was "a lull or a

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pause[.]" Id. Faalogo had Schmitt in a choke hold, silencing Schmitt's screams and preventing Schmitt from making any sounds that would alert Wales of Schmitt's peril. CP 654 lines 16-19; CP 627 at ¶7.

Wales again left B Unit, and Faalogo immediately resumed his violent attack on Schmitt. CP 674-675. Several times Faalogo picked Schmitt up into the air and slammed Schmitt onto the concrete floor. CP 652 lines 6-7, 12-14; CP 677 lines 6-7. Faalogo then jumped into the air and stomped onto Schmitt's abdomen. CP 652 lines 18-19; CP 677 lines 10-12.

Faalogo then rushed to the window of cell 2/3 and instructed Belanger to "tell [the guards] to pop 2/3 house." CP 656 lines 6-7. Faalogo's instruction meant for Belanger to tell the deputies to unlock the door of Schmitt's cell 2/3. Id. lines 7-8; CP 677 lines 21-22.

Belanger did as Faalogo ordered, and Deputy Rankin opened cell 2/3 remotely, and Faalogo exited Schmitt's cell. CP 641; CP 656 lines 10-11. When Rankin unlocked cell 2/3, the emergency light which indicates that an emergency call button had been pressed, turned off. Id. lines 16-19; CP 658 lines 3-19. The emergency light is a large light, and visible to everybody. Id. Schmitt immediately pulled the door of cell 2/3 closed, locking himself inside in order to

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prevent any further attacks. CP 679-680 lines 24-1. After exiting Schmitt's cell, Faalogo, in a threatening manner, directed Belanger to "[g]et in the cell," which made Belanger fearful for his own safety. CP 682-683 lines 24-4. Rankin observed that something was amiss and opened the door into B Unit and removed Belanger. Id. lines 4-7; CP 641.

Jail deputies responded and Faalogo was placed into restraints and removed. Id. Wales then went to Schmitt's cell, where Wales observed a large bruise on the left side of Schmitt's head, and Schmitt informed Wales that he thought he had broken ribs, and Schmitt was taken to medical. Id. Schmitt was seen by RN Boling at 0730 hours. CP 685; CP 688. Schmitt informed Boling of the assault. CP 685; CP 688. Boling asked Schmitt if he was injured, and Schmitt informed Boling that it was to soon for Schmitt to know how badly he was injured. CP 691 lines 9-15. Boling took Schmitt's blood pressure and pulse, and performed no other examination of Schmitt. CP 693; CP 699 lines 4-7. Boling told Schmitt that he would be given Tylenol later when the medical cart came around to administer medication. CP 691 lines 15-17.

Rather than place Schmitt under observation in one of the numerous observation cells in the medical department, Schmitt was sent back to 3 West. CP 641; CP 691 line 17.

Schmitt informed Wales that he was hurt and that Schmitt did not know how badly. CP 701 lines 2-3. Schmitt informed Wales that he was scared and could not be in a two man cell. Wales then handcuffed Schmitt, and at 0742 hours, placed Schmitt in the hole for "peace and harmony." CP 641; CP 701 lines 3-11; CP 634.

Once in the hole, Schmitt began suffering excruciating pain, and Schmitt began spitting up and urinating blood. CP 701 lines 12-16; CP 702 lines 5-12. Schmitt showed Deputy Journey that he was spitting up blood, and begged for assistance. CP 701 lines 15-17, 23-25. Schmitt pressed the emergency call button in his cell, and told Deputy Wilson that he was in horrifying pain, spitting up blood, and begged Wilson to please get medical help. Id. lines 17-23.

After several hours, deputy Vicente came to the hole and escorted Schmitt to medical where Schmitt was seen by Steve Carver. CP 703 lines 1-4; CP 693. Carver informed Schmitt that he had a torn stomach muscle like one gets from doing to many sit-ups. CP 703 lines 13-15. Carver was sending Schmitt back to the hole when Vicente reminded Carver that he was going to secure a urine sample, which, once taken, showed blood in Schmitt's urine. Id. lines 15-21; CP 705. Schmitt was finally placed into a medical observation cell, and given Tylenol 3 by Boling at 1100

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hours. **Id.**

Schmitt was transported to Tacoma General Hospital, where, upon discovering that Schmitt had internal bleeding related to kidney injury, Schmitt was transferred via ambulance to Saint Joseph's Hospital's trauma care unit. Schmitt was found to have four broken ribs, hematoma of left kidney, acute pain due to trauma, acute cervical strain, and a laceration to his left kidney. **CP 707-708.**

Saint Joseph's Hospital prescribed Schmitt a 30 day supply of cyclobenzaprine 10 MG (commonly known as Flexeril) to be taken by mouth three times a day, as needed. **CP 711; CP 715.** Saint Joseph's Hospital also prescribed Schmitt a 30 day supply of tramadol 50 MG (commonly known as ultram) to be taken by mouth every six hours, as needed for pain. **CP 711; CP 717.**

On June 19, 2014, Schmitt was released from Saint Joseph's Hospital and returned to the jail. **CP 719.** Schmitt was placed back into the same cell in the hole where Schmitt was placed on the morning of June 17, 2014, after being assaulted by Faalogo. **CP 634.** Schmitt was given toradol 60 MG at approximately 1500 hours. **CP 721.** At 2:41 PM, on June 19, 2014, Steve Carver entered the Saint Joseph's prescriptions for tramadol and cyclobenzaprine. **CP 694-695.**

For the next 4 days, Schmitt begged jail staff and

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medical staff for the prescribed medications to help with the pain Schmitt was suffering. CP 630 at ¶22. At approximately 2100 hours on the night of June 21, 2014, Nurse Josh Griffith gave Schmitt some ibuprofen. Id. Finally, on Monday, June 23, 2014, at approximately 1800 hours, Schmitt was provided the medications prescribed by Saint Joseph's Hospital. Id.

On April 18, 2017, Schmitt, through his attorney Thomas Olmstead, filed a complaint for negligence against PCJ and CONMED, the company contracted through PCJ to provide medical care for inmates housed in the jail while Schmitt was incarcerated there. CP 1-6. The complaint alleged the following: That Faalogo was known to be extremely violent, with serious mental health issues. CP 1-2 §2.1-§2.2; That on the morning of June 17, 2014, "[w]hen [Faalogo] was placed into general population, [Schmitt] was sound asleep." CP 2 §2.3; That during the assault, Schmitt pressed the emergency call alarm in his cell, and PCJ staff failed to check the cell Schmitt was in and had activated the alarm. CP 2-3 §2.5; That PCJ "failed to provide [Schmitt] with a safe environment by placing the assaulting inmate in a location where [Faalogo] could have access to the sleeping plaintiff." CP 3 §2.6; That the lack of medical treatment rendered by CONMED was "below the standard for a medical

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treatment provider in the state of Washington." CP 4 §2.13; That the "above-named deputies and Pierce County Jail were negligent in putting a violent inmate in a position where he could assault [Schmitt] and negligently failed to provide necessary medical attention to [Schmitt's] injuries. CP 4 §2.14.

On November 9, 2018, PCJ filed a motion for summary judgment, seeking the dismissal of Schmitt's complaint. CP 7-25. PCJ sought summary judgment on the basis that expert testimony on jail classification procedures was necessary in order for Schmitt's claim to move forwards, and that Schmitt had failed to secure said expert testimony. Id. Classification and housing was the focus of PCJ's motion for summary judgment. CP 8-13. The motion for summary judgment only sought dismissal of the allegations of negligence for the assault, and was completely silent on §2.14 of Schmitt's claim, which asserted that PCJ "negligently failed to provide necessary medical attention to [Schmitt's] injuries." CP 7-25.

On November 9, 2017, PCJ filed a declaration by their expert, Ric Bishop. CP 33-65. Bishop's declaration stated that

> "Using my training, experience and education in corrections, I reviewed the complaint filed by Mr. Schmitt against Pierce County. The complaint

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> alleges that Mr. Faalogo was improperly placed in a housing unit where he attacked Mr. Schmitt. In my area of expertise, this is a question of whether Mr. Faalogo and Mr. Schmitt were properly classified (or housed) at the PCDCC."

CP 47. Bishop's declaration did not address Schmitt's claim of negligence §2.6 which asserted that PCJ failed to provide for Schmitt's safety by allowing Faalogo access to the sleeping Schmitt, and §2.14 which asserted that PCJ negligently failed to provide necessary medical attention to Schmitt's injuries. **CP 33-65.**

On December 31, 2018, Schmitt filed an opposition to the defendant's motion for summary judgment. **CP 135-160.** Council agreed to dismiss Schmitt's medical negligence claims without prejudice, and maintained all other tort claims. **CP 140.** The opposition asserted, in particular, that

> "[1] Defendants were negligent when they failed to respond to the emergency call system that was activated in the plaintiff's cell; [2] the Defendants were negligent when they failed to check the safety of the lower tier inmates after they had heard cries for help and yelling/screaming; [3] Defendants were negligent by leaving a sleeping inmate, who is vulnerable to surprise attack, in an unlocked and open cell; and [4] Defendants were negligent when they failed to comply with the hospital Doctors' orders for the post hospitalization care of Mr. Schmitt -- to wit, they failed to provide prescribed and needed pain medications for close to 100 hours, thus causing Mr. Schmitt to suffer unnecessary pain."

Id. The opposition, just like the complaint, never asserted

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a classification error on the part of PCJ. **CP 135-160.**

On January 7, 2019, PCJ filed a reply in support of the previously filed motion for summary judgment. **CP 714-729.** In this reply, even though it was not raised in the motion for summary judgment filed on November 9, 2018, PCJ sought dismissal of Schmitt's claim that PCJ was negligent by failed to provide necessary medical care for Schmitt. **CP 715** lines 6-12. The reply again asserted that "Plaintiff's theory of negligence relates to the adequacy of monitoring and placement of inmates by correctional staff." **CP 717-718** lines 24-1.

Argument was heard from the parties by Judge Melissa Hemstreet on January 11, 2019. **VRP 1-36.** The decision granting defendant's motion for summary judgment was entered on January 25, 2019. **CP 734-738** Schmitt, pro se, now appeals from that decision.

II. STANDARD OF REVIEW

A trial court's summary judgment order is reviewed de novo. **Folsom v Burger King,** 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. **Hertog, ex rel. S.A.H. v City of Seattle,** 138 Wn.2d 265, 275, 979 P.2d 400 (1999) (citing **Taggart v State,** 118 Wn.2d 195, 199, 822 P.2d 243 (1992); CR

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56(c)).

When determining if summary judgment is appropriate, the court must construe all facts and inferences in the light most favorable to the nonmoving party. **Hertog** at 275 (citing **Taggart** at 199). If the nonmoving party "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" summary judgment is proper. **Young v Key Pharms**, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting **Celotex Corp. v Catrett**, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

To prevail in a negligence suit, a party must prove the following elements: (1) existence of a legal duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. **Christensen v Royal Sch. Dist. No. 160**, 156 Wn.2d 62, 66, 124 P.3d 283 (2005). Whether a given defendant owes a duty is generally a question of law. **Yong Tao v Heng Bin Li**, 140 Wn. App. 825, 833, 166 P.3d 1263 (2007). "But where duty depends on proof of certain facts, which may be disputed, summary judgment is inappropriate." **Sjogren v Props. of the Pac. N.W., LLC**, 118 Wn. App. 144, 148, 75 P.3d 592 (2003).

Generally there is no duty to prevent a third person from causing physical injury to another. **N.L. v Bethel Sch. Dist.**, 186 Wn.2d 422, 429, 378 P.3d 162 (2016). However, the

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duty to guard against a third party's conduct may exist where an actor's affirmative act has exposed another to a recognizable high degree of risk of harm through such misconduct, which a reasonable person would take into account. **Parrilla v King County,** ___ Wn. App. ___, 157 P.3d 879, 883 (2007) (citing **Kim v Budget Rent A Car Sys., Inc.,** 143 Wn.2d 190, 196, 15 P.3d 1283 (2001)).

III. ARGUMENT

Introduction

PCJ intentionally misapprehends Schmitt's claim of negligence as one that hinges on the classification of jail detainees. Doing so allows PCJ to create a scenario where expert testimony is necessary in order to establish the standard of care owed to Schmitt, thereby permitting PCJ to seek summary judgment on the basis that Schmitt has presented no expert testimony. This case is not -- and never has been -- about the classification of jail detainees.

This case is about an actor who's affirmative act created and exposed Schmitt to a recognizable high degree of risk of harm -- one that a reasonable person would have taken into account. Wales, while knowing that Schmitt was in a "dead sleep," unlocked Schmitt's cell door and abandoned Schmitt by exiting the unit.

This affirmative act created a duty to protect

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Schmitt -- a duty separate and distinct from, yet still in addition to, the duty owed to Schmitt under the *SPECIAL* relationship that exists between jailers and their detainees. Most critically, this duty, by virtue of requiring a "reasonable person" to recognize the high degree of risk, cannot hinge on expert testimony.

A. EXPERT TESTIMONY IS NOT NECESSARY IN ORDER TO ESTABLISH THE DUTY OF CARE OWED TO SCHMITT AS THE RESULT OF THE AFFIRMATIVE ACT'S COMMITTED BY WALES.

The determination that a duty of care exists under the circumstances here alleged is compelled by RESTATEMENT (SECOND) OF TORTS § 302 B ("Restatement"), and our Supreme Court's interpretation thereof. **See Robb v City of Seattle,** 176 Wn.2d 427, 295 P.3d 212, 219 (2013); **Kim** 143 Wn.2d at 196-198. Section 302 B provides:

> An act or an omission may be negligent **if the actor realizes or should realize** that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, **even though such conduct is criminal.**

(emphasis added).

Section 302B comment e further provides:

> There are, however, situations in which the actor, **as a reasonable man,** is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him

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> against such intentional misconduct; or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, **which a reasonable man would take into account.**

(emphasis added).

In **Robb**, our Court held that "a duty may arise under § 302B comment e, absent a special relationship." **Id.** 295 P.3d 219. The Robb Court went of to say

> "However, we hold that such a duty arises outside of the context of a special relationship **only where the actor's conduct constitutes misfeasance.**"

(emphasis added) **Id.** Before the affirmative acts of Wales are considered misfeasance, said acts must create a **new** risk of harm to Schmitt. **Id.** 295 P.3d 218.

This conclusion is supported by Restatement § 302 comment a, which according to § 302 comment a is "equally applicable" to § 302 and § 302B. Section 302 comment a states in part:

> "In general, anyone who does an affirmative act **is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.** The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relationship between the actor and the other which gives rise to the duty. As to the distinction between act and omission, or "misfeasance" and "non-feasance," see § 314 and Comments."

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(emphasis added) **Robb** 295 P.3d 217.

Under Restatement § 314, an actor might have a duty to take action for the aid or protection of the plaintiff in cases involving misfeasance (or affirmative acts), where the actor's prior conduct, whether tortious or innocent, **may have created a situation of peril to the other.** Liability for nonfeasance (or omissions), on the other hand, is largely confined to situations where a special relationship exists. **Robb** 295 P.3d 217.

Wales created a situation of peril for Schmitt by unlocking Schmitt's cell door and leaving the unit, while knowing that Schmitt was in a "dead sleep."

On the morning of June 17, 2014, Schmitt was the only person housed in cell 2/3. **CP 626** ¶3; **CP 199-200** lines 17-11. It is undisputed that on the morning of June 17, 2014, Wales unlocked Schmitt's cell door. **CP 641.** After unlocking Schmitt's cell door, Wales admits that he left the unit -- while knowing that Schmitt was sleeping. In fact, Wales characterized how soundly Schmitt was sleeping as a "dead sleep."

> "When I/M Faalogo assaulted I/M Schmitt today I/M Schmitt was in a dead sleep before the assault (I know this because I viewed I/M Schmitt sleeping before I left the unit moments before the assault occurred).

CP 642.

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Schmitt was safely secured in cell 2/3, alone, where no other inmates could gain access to him -- until Wales unlocked Schmitt's cell door **and left the unit**, while knowing Schmitt to be soundly asleep. Faalogo then attacked Schmitt, causing serious and life threatening injuries.

It cannot be disputed that the actions of Wales created a situation of peril for Schmitt, and as such, those actions constitute misfeasance. In so committing these acts, Wales created a duty to Schmitt under Restatement 302B -- **a duty outside** that of the existing special relationship between a jailer and their detainee.

> **A reasonable person would have taken into account the recognizable high degree of risk of harm of unlocking Schmitt's cell door and leaving the unit while knowing that Schmitt was in a "dead sleep."**

The people of Washington, through the legislature, and in turn, the courts, have long set forth that a sleeping person is particularly vulnerable. This knowledge is emphasized under the Aggravating Circumstances found in RCW 9.94A.535(3)(b), which provides that an exceptional sentence above the standard sentencing range is appropriate when the victim was particularly vulnerable -- such as when sleeping.

State law provides that "[t]he facts supporting aggravating circumstances shall be proved **to a jury** beyond a reasonable doubt." (emphasis added) RCW 9.94A.537(3). Thus,

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in criminal proceedings, juries (who Schmitt submits are "reasonable" persons) are tasked with making the determination that a sleeping victim was particularly vulnerable or incapable of resistance. Since juries, who are reasonable persons, are expected to understand that a sleeping person is particularly vulnerable, then it logically follows that **all** reasonable persons would have recognized the high degree of risk of harm Schmitt was being subjected to.

Every court has acknowledged human vulnerability when sleeping: Minnesota v. Olson, 495 U.S. 91, 99 (1990) ("We are at our most vulnerable when we are asleep because we cannot defend ourselves[.]"); Walton v Dawson, 752 F.3d 1109, 1120 (8th Cir. 2014) ("Detainees are most vulnerable when asleep, and the Constitution guarantees a minimum right to sleep without legitimate fear of a nighttime assault by another detainee."); Pavlick v Mifflin, 90 F.3d 205, 208-209 (7th Cir. 1996) (Affirming judgment against prison guard who knew he was exposing an inmate to substantial risk of serious harm by opening the sleeping inmate's cell door.); State v S.H., 75 Wn. App 1, 10, 877 P.2d 205 (1994) (A sleeping victim is particularly vulnerable due to inability to resist before being attacked).

In United States v Wetchie, 207 F.3d 632, 634 (9th Cir.

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2000), the court observed that "Certain characteristic[s] renders the victim unusually vulnerable, i.e. less able to resist than the typical victim[.]" The court went on to observe that "[s]uch increased susceptibility encourages criminal conduct by making it easier to commit, resulting in criminal acts that might not have taken place at all if not for the victims heightened vulnerability, here a certain characteristic of the victim -- her being asleep -- rendered her less able to resist criminal conduct than a typical victim."

The same is true in this case: Faalogo did not assault anyone else. He **acted** aggressive and threatening towards Belanger and PCJ staff, but his assault was upon Schmitt -- and that assault was the result of Schmitt's "heightened vulnerability."

Wales knew that Schmitt's cell was in an area considered maximum security. **CP 366.** Wales knew that, by virtue of living in 3 West, the people there were "more assaultive to others." **CP 341-342** lines 23-1. Even so, Wales unlocked Schmitt's cell, and **without** waking Schmitt from a "dead sleep," Wales left the unit -- abandoning the particularly vulnerable Schmitt in a maximum security area filled with assaultive inmates. Wales "act[ed] with knowledge of peculiar conditions which create a high degree

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of risk of intentional misconduct[.]" Parrilla at 157 P.3d 883 (citing Restatement 3028, comment e, section H).

The high risk of harm to Schmitt was recognizable, and would have been taken into account by a reasonable person.

Having exposed Schmitt to an unreasonable high risk of harm, Wales had a duty to check on Schmitt's welfare after hearing screams from B unit.

Schmitt has established both that (1) Wales actions created a new risk of harm, and therefore constitute misfeasance, and (2) a reasonable person would have taken into account that abandoning the particularly vulnerable Schmitt in maximum security with assaultive inmates exposed Schmitt to a high degree of risk of harm. It follows that Wales had a duty to check on Schmitt's welfare once Wales heard screams -- particularly since Wales believed that, when hearing the screams, they came from a sleeping inmate. CP 641.

Wales did not check on Schmitt. Instead, Wales checked the upper tier, and then exited the unit -- abandoning Schmitt a second time. This time when Wales abandoned Schmitt, the recognizable high degree of risk of harm had Schmitt from behind in a choke-hold, telling Schmitt that he was going to be killed.

Wales failure to check on Schmitt's welfare after hearing screams was a breech and/or continued breach of the

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duty of care created by earlier misfeasance. Schmitt believes that a jury should make the determination of liability for this failure.

Schmitt's claim that Wales failed to respond to the emergency call button should not have been dismissed.

Schmitt testified that he pressed the emergency call button in his cell after Faalogo attacked Schmitt in his sleep. CP 237 lines 9-14. Belanger testified that he saw the emergency light was on. That the light was a large overhead style light visible to everybody, and that when Deputy Rankin remotely unlocked cell 2/3, the emergency light turned off. CP 656 lines 16-25; CP 658 lines 1-19.

Schmitt offers a detailed description of the overhead style light in his declaration

> "In 3W[est] of the old jail, the deputy "cluster area is central, with heavy plastic windows allowing viewing into sections 3W[est]A [Unit], 3W[est]B [Unit], and 3W[est]C [Unit]. In turn, prisoners inside of one of these sections are able to look out into the cluster area. There is an emergency light located approximately 5-6 feet high, mounted on the cluster wall right outside of 3W[est]B [Unit]. The emergency light is a heavy white plastic light, with a white cover. The emergency light turns on whenever an inmate presses their emergency alarm button in their cells. This light is designed to be visible to the deputies working in 3W[est], whether they are standing in the cluster, or they are in one of the housing sections.

CP 630 ¶23.

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Wales testified that when an emergency call button is pushed "it would -- if the system's working properly, would activate a light in the staff station[.]" CP 378 lines 8-10.

Even though Schmitt, Belanger, and Wales describe the functioning of the emergency call alarm system the same way, Bishop, the "expert" for PCJ, states that "in [Bishop's] opinion [Belanger] cannot say definitely the emergency call button had been activated." CP 57. This "expert" opinion is less than persuasive in the face of the evidence provided by Wales -- who is a defendant in this case. Bishop provides this expert opinion even though he admits that he did not go to the jail in relation to this complaint. CP 46 ("From photos, reports, and a previous visit to the PCDCC **(unrelated to this matter)**[.]") (emphasis added).

When Wales was asked if "there was a button pushed by an inmate inside his cell area" during the assault on June 17, 2014, Wales testified "I don't recall any button being pushed." CP 357 lines 15-17. Wales did not testify that a button had **not** been pushed. Wales did not testify that, at any time during the assault (such as after hearing screams) he checked to see if an emergency button had been pushed. Wales testified only that he didn't recall if a button had been pushed.

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Schmitt's claim of negligence on this issue should not have been dismissed.

It was improper for the court to grant summary judgment on Schmitt's claim that PCJ was negligent in providing health care.

Summary judgment on Schmitt's claim that PCJ was negligent in providing for his health care was not correctly before the court, and therefore dismissal was improper.

At no point did PCJ's motion for summary judgment mention or request dismissal of Schmitt's negligence claim stated in §2.14 of the complaint. CP 7-32. ConMed **did** seek dismissal of Schmitt's medical claims in their motion for summary judgment, which is why the opposition dismissed the **medical negligence** claims, and **maintained all other tort claims.** CP 140 lines 2-5. The opposition asserted negligence on the part of PCJ for failing to provide care to Schmitt. CP 140 lines 10-13.

PCJ requested summary judgment for this **in their reply,** advancing that summary judgment was warranted because (1) Schmitt was not proceeding on that claim, and (2) that medication management was a job function of ConMed employees, an independent medical provider, and not Pierce County. Even were it permissible to seek summary judgment for §2.14 in the reply, neither of these things are a basis for granting summary judgment.

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1. Schmitt **did not** dismiss this claim against PCJ, which is evidenced in the opposition. **CP 140** lines 2-5; **CP** 21-22; **RP** 12-15.

2. PCJ's duty to provide for Schmitt's health care is nondelegable and the duty "is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty." Shea v City of Spokane, 17 Wn. App. 236, 242, 562 P.2d 264 (1977). "Stated another way, the duty is so intertwined with the responsibility of the City as custodian that it cannot be relieved of liability for the negligent exercise of that duty by delegating it to an 'independent contractor' physician." **Id.** (citations omitted). Schmitt repeatedly asked jail staff for help. **CP 628** ¶14 ("I told Deputy Wilson that I was suffering, and begged Deputy Wilson to get me medical care."); **Id.** at ¶15 ("I showed Deputy Journey that I was coughing up blood, and explained to Deputy Journey the pain I was suffering, and begged Deputy Journey to get me medical care."); **CP 630** at ¶22 ("I was suffering from pain, and I repeatedly asked jail guards, and medical staff for pain medication."); **CP 246** lines 19-21 ("I told them, Listen, I'm hurt, man. I'm spitting up blood. I need you to call medical. I need to see medical.); **Id.** lines 24-25 ("I showed [Deputy Journey] that I was spitting up blood and I

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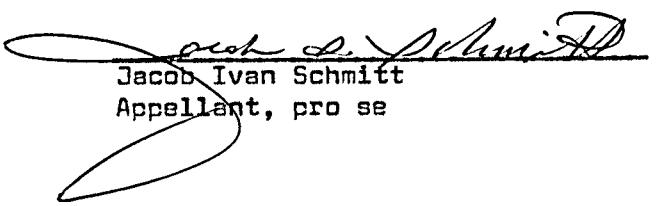
begged him for some help.")

It was improper for the court to dismiss this claim when PCJ raised it for the first time in the reply. Even were it permissible to grant summary judgment requested in the reply, PCJ has offered no basis for dismissal. Schmitt did not dismiss this claim, and PCJ's burden may not be shifted to ConMed. It also bears noting that PCJ has provided no expert testimony on the standard of health care owed to Schmitt -- or that PCJ met that standard. For these reasons this claim must proceed to trial.

IV. CONCLUSION

For the above reasons Schmitt asks this court to reverse the order dismissing these claims and remand for trial. Any further relief this court deems appropriate.

Respectfully submitted April 16, 2020.



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CERTIFICATE OF SERVICE

I certify that on the below signed date I cause a complete copy of these documents to be placed into the U.S. Mail, postage prepaid, sent to:

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I DECLARE UNDER THE PENALTY OF PERJURY UNDER LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED this 16th day of April, 2020, in Monroe, Washington, County of Snohomish.

Jacob Ivan Schmitt #711473